United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7081

United States Court of Appeals

For the Second Circuit.

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Appellants,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

On Appeal from an Order of the United States District Court for the Eastern District of New York

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC AND ALTERNATIVELY, FOR A STAY OF THE MANDATE PENDING A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Appellants
515 Madison Avenue
New York, N.Y.
(212) 688-8555

JOSEPH P. MARRO
MARTIN L. ROTHSTEIN
Of Counsel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 75-7081

VINCENZO BURRAFATO and
ANTONINA BURRAFATO,

Petitioners-Appellants,

-against-

U.S. DEPARTMENT OF STATE and U.S.
IMMIGRATION & NATURALIZATION SERVICE,

Respondents-Appellees.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC AND ALTERNATIVELY, FOR A STAY OF THE MANDATE PENDING A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT

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Preliminary Statement

The Petitioners-Appellants respectfully pray for an order of this Court pursuant to Rule 40 of the Federal Rules of Civil Procedure directing rehearing of the decision of this Court, dated August 13, 1975, and further suggest that the matter be heard by this Court in banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure. Alternatively, the Petitioners-Appellants respectfully request that the Court enter an order pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure staying the mandate herein pending an application to the Supreme Court of the United States for a writ of certiorari.

Statement of the Issues Presented

1. Whether the District Court has jurisdiction over a claim by a United States citizen spouse that her Fifth Amendment rights were violated by the exclusion of her husband from the United States where such exclusion was procedurally defective and made in violation of law.

2. Whether the District Court is without jurisdiction of a suit by an alien to compel a federal agency to comply with its own regulations (which require that prior to denying an immigrant visa, the applicant must be informed of the reasons for the denial and provided with an opportunity for rebuttal) merely because the alien entered the United States

without being in possession of the very document which he claims was unlawfully denied to him by that agency.

3. Whether, in failing to specify which of thirty-one possible grounds for exclusion contained in Section 212(a) of the Immigration & Nationality Act formed the basis of Appellant's exclusion from the United States, the Department of State violated its own regulations which require reasons and an opportunity for rebuttal.

4. Whether the constitutional right of United States citizens to hear the views of a foreign speaker [to protect which the Supreme Court found jurisdiction in Kleindienst v. Mandel, 408 U.S. 753(1972)] is a greater right so as to confer jurisdiction than that of a United States citizen wife to have her husband's consortium and support which rights were undisputedly denied to her in violation of law.

5. Whether the Court has jurisdiction, even if no constitutional right is deemed violated, to review a denial of a visa made in violation of law, where the alien is denied a right that Congress and the Department of State's own regulations confer upon him and results in depriving his United States citizen wife of her rights to consortium and support.

6. Whether the Court can refuse to consider the merits of the Appellants' claim where the denial of an

immigrant visa on the basis of "association with organized criminal society" does not as a matter of law constitute a ground of exclusion under the statute alleged, Section 212(a)(27) of the Immigration & Nationality Act, thus allowing an unlawful decision of the Department of State to remain unchallengeable.

7. Whether the Court was correct in holding that an alien "illegally" in the United States is denied access to the federal courts to seek review of a denial of an immigrant visa where such denial deprived the alien of procedural due process of law.

Statement of the Case

The Appellant, Vincenzo Burrafato (hereinafter, "Burrafato") is an alien, a native and citizen of Italy. In 1961, he was married in Italy to the co-Appellant, Antonina Burrafato, a citizen of the United States. Appellants are the parents of two children born in Italy both of whom are now lawful permanent residents of the United States. Based on the marriage, the Immigration & Naturalization Service (hereinafter, the "Service") approved the status of Burrafato as the spouse of a United States citizen, the first step of eligibility in the procedure for conferring permanent resident status based upon a marriage to a United States citizen.

On or about February 1970, Burrafato applied at the American Consulate in Palermo, Italy for an immigrant visa to enter this country. While this application was pending, Burrafato's wife and children returned to the United States in January 1971. Without stating any reasons or providing any justification for his action, Burrafato subsequently learned that his visa application was denied by the United States Consul. On or about October 21, 1971, in response to prior counsel's request for reconsideration, the Visa Office of the Department of State informed the Appellants by letter that upon review:

> "[N]o facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act." (A.p. viii)*

As a result of this unbearable separation from his family and distraught by the frustration of not knowing why he was found ineligible for admission to the United States, Burrafato left Italy and illegally entered the United States in the drastic attempt to be reunited with his family. However, on or about December 7, 1972, the Service commenced deportation proceedings against him.

At the deportation hearing, Burrafato through his counsel, conceded he was deportable for having entered the

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*References preceded by the letter "A" refer to pages in the Appendix annexed to this petition.

United States without a valid visa, but Burrafato was awarded the privilege of voluntary departure by the Immigration Judge upon a showing of his good moral character.

On June 4, 1974, the Appellants commenced this action seeking declaratory and injunctive relief. However, on January 20, 1975, Judge Bruchhausen granted the Government's motion to dismiss the complaint for lack of jurisdiction.* Thereafter, on January 28, 1975, Judge Bruckhausen granted the Appellants' motion to enjoin the Service, pending appeal, from deporting Burrafato or from withdrawing the privilege of voluntary departure until seven days following the issuance of the mandate by this Court or any other extensions that may lawfully be granted.

On August 13, 1975, this Court rendered its opinion and affirmed the decision of the Court below. A copy of the Court's opinion is attached as an appendix to this petition (App. i-vii).

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* In the Government's affidavit filed in support of the motion, the Assistant United States Attorney stated that the basis of the denial as "association with organized criminal society". This was the first time that any basis whatsoever was made known to the Appellants.

ARGUMENT

Point I

The District Court Has Jurisdiction to Review a Decision of the Department of State to Deny a Visa Where the Denial is Procedurally Defective and Based on an Error of Law.

This Court's opinion, while conceding that the Appellants have raised a substantial issue by their claim of denial of due process, determined that it lacked jurisdiction to consider the merits on the ground that the judiciary should not interfere with the policy of Congress in excluding aliens. In support of this conclusion, the Court relied upon the often-quoted language of Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895), cited with approval in Kleindienst v. Mandel, 408 U.S. 753, 766 (1972), to the effect that the judiciary would not interfere with the legislative and executive policies regarding the exclusion of aliens. However, this long-standing proposition has been held to apply where an attack is made on the constitutionality, validity or efficacy of a statute or policy. No such attack is made herein. To the contrary, Appellants rely upon an enactment of the executive branch embodied in 22 CFR Sec. 42.130 (App. ix-x), to support their claim that Burrafato had been denied procedural due process of law. It is undisputed that this regulatory authority has the force and effect of law and is equally binding upon the Department of State. Boske v. Comingore, 177 U.S. 459 (1900); California Commission v. United States, 355 U.S. 534 (1958).

The regulation in question, 22 CFR Sec. 42.130, provides that an individual whose request for a visa has been denied, is entitled to be "informed of the provision of law, or regulation issued thereunder, on which the refusal is based". As previously stated, Burrafato was not informed of the particular basis for the denial until more than three years after his visa was denied. Furthermore, the clear intent of the regulations envisions disclosure of the adverse information in order that the applicant for the visa may present additional evidence to overcome the denial. If the applicant is not provided with the particular information which he must rebut, then the regulation allowing such an opportunity would be meaningless.

Furthermore, the original basis disclosed by the Department of State in denying Burrafato's application for a visa was set forth in the Department's letter of October 21, 1971 (A.p. viii). The letter claimed that the visa was denied under Section 212(a) of the Act, 8 U.S.C., Sec. 1182(a). However, that section contains the general classes of aliens ineligible to receive a visa and excludable from admission to the United States. That section is broken down into thirty-one subdivisions, including by way of illustrating the variety of causes, aliens who are mentally retarded, insane, sexual deviates, drug addicts, criminals, Communists, etc. It was not until some three years later that the Government

in its affidavit in support of the motion to dismiss, chose to further refine the denial and limit the ground to Section 212(a)(27) of the Act, 8 U.S.C. Sec. 1182(a)(27). Thus, by failing to disclose the particular subsection alleged, Burrafato was effectively precluded from knowing the basis of the visa denial in direct contravention of the regulation.

The Appellants contend further that the denial of the visa originally made without specifying any reasons and still unsupported by any factual justification, is contrary to the enlightened position taken by the Supreme Court in Kleindienst v. Mandel, Supra. There the Court was asked to review the decision by the Department of State and the Attorney General not to authorize a waiver of a ground of exclusion, and consequently to deny a nonimmigrant visa. In holding that it had jurisdiction, the Supreme Court enunciated the test that where a constitutional right was invoked, the Court would merely look to see that the basis for the denial was supported by a "facially legitimate and bona fide reason" (484 U.S. p. 770).

This Court, however, distinguished Mandel upon the basis that no constitutional right of an American citizen was "implicated" herein. In so holding, the Court rejected the argument of the co-Appellant, Antonina Burrafato, that her Fifth Amendment rights of due process and equal protection of the law were denied to her. She claims that by denying a visa to her husband without providing him procedural due

process, her rights to consortium as well as to the comfort and support of her husband represents to her an unlawful deprivation of "life, liberty or property, without due process of law", and a denial of equal protection of the law under the Fifth Amendment.

In response to this argument, the Court found it sufficient to merely refer to its recent decision in Noel v. Chapman, 508 F.2d 1023, 1027-28 (2d Cir. 1975). However, in Noel the Court specifically found jurisdiction to review the merits and merely refused to overturn the decision of the Immigration Service which had acted in accordance with its stated policy. In the present case, no such policy of the Service or the Department of State is under attack. Furthermore, the Court herein found no jurisdiction to consider the merits and, of even greater significance, the actions of the Department of State complained of were undisputedly contrary to its own regulations and therefore in violation of law (22 CFR Sec. 42.130).

Finally, assuming that the Court is correct in stating that, "Whether the District Court was correct in dismissing the complaint for lack of subject matter jurisdiction turns, of course, on the validity of the claims alleged (A.p. iv)", the Court failed to consider a significant argument of the Appellants, to wit: Whether "association with organized criminal society", even if such could be proven,

constitutes a ground of exclusion under Section 212(a)(27) of the Act (A.p. ix).

Although the origina denial letter from the Department of State only referred to the general exclusion statute, Section 212(a) of the Act, 8 U.S.C. Sec. 1182(a), (A.p. viii), the Government in its affidavit in support of the motion to dismiss the complaint, characterized the ground for the denial as:

> "... pursuant to Section 212(a)(27) [association with organized criminal society] of the Immigration & Nationality Act..."

The Appellants argue that it is a manifest and flagrant violation of law for the Department of State to rule that "association with organized criminal society" constitutes a ground of exclusion which Congress intended to include within the purview of Section 212(a)(27) of the Act, 8 U.S.C. Sec. 1182(a)(27). The legislative history of this subsection is reflected in the U.S. Code Cong. & Admin. News, Vol. 2, p. 1703 (1952), as follows:

> "Paragraphs (27), (28) and (29) of Section 212(a) incorporate the provisions of Section 1 of the Act of October 16, 1918, as amended by Section 22 of the Subversive Activities Control Act of 1950, relating to the exclusion of subversives." (Emphasis added)

What emerges from an analysis of the legislative history of Section 212(a)(27), is that Congress was concerned entirely with the exclusion of political subversives. We submit that the proper approach to determine the scope of a

provision contained in Section 212(a) was that taken by the Supreme Court in Boutilier v. Immigration & Naturalization Service, 387 U.S. 118 (1967). There the Court made an exhaustive analysis of the legislative history of that provision in order to determine the Congressional intent.

In the present case, a similar analysis of the legislative history of Section 212(a)(27) demonstrates that the conduct of which the alien has been accused, clearly does not come within the Congressionally intended ambit of the provision in question. For the reasons previously indicated, there is no question that Congress was concerned exclusively with threats to the national interest derived from political subversive activities. Accordingly, the State Department's ruling, including "association with organized criminal society" within the provisions of Section 212(a)(27) was contrary to the intent of that section, and an error of law.

If these Appellants are barred from raising this issue in the Courts, there can never be any restraint upon the State Department's power to interpret the law as incorrectly as it wishes, or not to conform to it at all, regardless of the impact on United States citizen relatives or the aliens themselves. Such an interpretation is contrary to the basic proposition that all administrative action is presumed subject to judicial review unless Congress

clearly intended otherwise -- which is certainly not the case here. See: Ortego v. Weinberger, 516 F.2d 1005 (5th Cir. 1975)

POINT II

This Court's Finding That Only Aliens "Legally" in the United States are Entitled to Procedural Due Process is Contrary to Law

In declining to find subject matter jurisdiction, the Court stated that:

> "If Vincenzo [Burrafato] were 'legally' within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally."

However, as has long been held, an alien is entitled to the same constitutional protections of life, liberty and property under the due process clause as is afforded to citizens and in defining this constitutional guarantee, the Supreme Court has held that "Fair Play" is the essence of due process. Galvan v. Press, 347 U.S. 522, 530 (1954). Furthermore, this Circuit has reacted severely against unlawful Government activity in order "to prevent district courts from themselves becoming accomplices in willful disobedience of law". United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974). There, the Court in reaffirming the doctrine that aliens in the United States may invoke the Fourth Amendment protection against illegal searches and the Fifth Amendment guarantee of due process stated, "No sound basis is offered in support of a

different rule with respect to aliens who are the victims of unconstitutional action abroad, at least where the government seeks to exploit the fruits of its unlawful conduct ..." (United States v. Toscanino, supra, at p. 280).

If the Court is sustained in its holding that an alien illegally in this country is denied access to the Courts to compel a governmental agency to abide by its regulations, it would render the regulations wholly meaningless and totally unenforceable. In essence then, although the executive branch has created a right, the aggrieved party would have no remedy.

Vincenzo Burrafato's plea to this Court is simple but desperate. He concedes, as he did before the Service, that he entered this country unlawfully and he is willing to depart according to law. Recognizing that he must leave as the law requires, he only asks that the Department of State also abide by the law. It should also be noted that this eleventh hour plea represents his last hope for living in this country and bringing up his children as good, law-abiding citizens under his supervision. He does not seek additional time solely in the hope that he can obtain some immigration benefit, as none seems to be foreseeable.

If this Court declines to hear reargument, then Appellants respectfully request a stay of the mandate pending an application to the Supreme Court for a writ of certiorari.

A stay of the mandate is required because without such, Burrafato's time within which to leave voluntarily will expire seven days after the mandate issues. Thus, in order to avoid remaining unlawfully in this country and to become automatically deportable, he would be forced to leave the United States and to be compelled to surrender his right to petition the Supreme Court for relief.

CONCLUSION

It is respectfully requested that the petition for rehearing with the suggestion for rehearing in banc be granted or alternatively, that this Court grant a stay of the mandate pending an application to the Supreme Court for a writ of certiorari.

Respectfully submitted,

FRIED, FRAGOMEN & DEL REY, P.C.
Attorneys for Petitioners-Appellants
515 Madison Ave.
New York, N.Y.

JOSEPH P. MARRO,
MARTIN L. ROTHSTEIN,

Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 981—September Term, 1974.

(Argued May 6, 1975 Decided August 13, 1975.)

Docket No. 75-7081

VINCENZO BURRAFATO and ANTONINA BURRAFATO,

Appellants,

v.

UNITED STATES DEPARTMENT OF STATE and
UNITED STATES IMMIGRATION & NATURALIZATION SERVICE,

Appellees.

Before:

FEINBERG, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment entered in the Eastern District of New York, Walter Bruchhausen, *District Judge,* dismissing for lack of subject matter jurisdiction a complaint which sought declaratory and injunctive relief based on the claims that denial of a visa to an alien husband violated the constitutional rights of his citizen wife and that the failure of the Department of State to specify the reasons for denial of the visa denied the husband procedural due process.

Affirmed.

JOSEPH P. MARRO, New York, N.Y. (Martin L. Rothstein, and Fried, Fragomen & Del Ray, New York, N.Y., on the brief), *for Appellants.*

PETER A. GOLDMAN, Asst. U.S. Atty., Brooklyn, N.Y. (David G. Trager, U.S. Atty., and Paul B. Bergman, Asst. U.S. Atty., Brooklyn, N.Y., on the brief), *for Appellees.*

TIMBERS, *Circuit Judge:*

On this appeal from a judgment entered in the Eastern District of New York on January 22, 1975, Walter Bruchhausen. *District Judge,* granting defendants' motion pursuant to Fed. R. Civ. P. 12(b)(1) to dismiss the complaint which sought declaratory and injunctive relief, the essential issue is whether the district court correctly held that it lacked subject matter jurisdiction over the complaint which claimed that the constitutional rights of a citizen wife had been violated by denial of her alien husband's visa application without reason by the United States Counsel in Palermo, Italy, and that failure of the Department of State in accordance with its regulations to specify the reasons for denial of the husband's visa application denied him procedural due process.

We affirm.

I.

Vincenzo Burrafato is a native and citizen of Italy. In 1961 he was married in Italy to Antonina Burrafato, a United States citizen. They are the parents of two children, 11 and 9 years of age, both of whom were born in Italy. In February 1970, Vincenzo applied to the United States Consul in Palermo for a permanent immigration

visa to the United States. The application was denied on the ground that he was ineligible under Section 212(a) of the Immigration & Nationality Act (the Act), 8 U.S.C. §1182(a) (1970). Upon request of appellants' counsel by letter dated September 22, 1971, the Visa Office of the Department of State reviewed the denial of the visa application and informed counsel by letter dated October 21, 1971 that "no facts were disclosed which would warrant a reversal of the original finding of ineligibility under [the statute]."

In the meanwhile, without waiting in Italy to learn whether his visa application would be granted, Vincenzo entered the United States illegally on February 17, 1970. When the Immigration & Naturalization Service learned of his illegal entry, he was served on December 7, 1972 with an order to show cause why he should not be deported pursuant to Section 241(a)(1) of the Act, 8 U.S.C. § 1251 (a)(1) (1970). At his deportation hearing, Vincenzo admitted that he had entered the United States without a valid immigrant visa or other entry document for permanent residence. Accordingly, on July 25, 1974, he was found to be deportable under 8 U.S.C. §1251(a)(1) (1970) by an immigration judge, but was granted the privilege of voluntary departure until November 25, 1974 pursuant to Section 244(e) of the Act, 8 U.S.C. §1254(e) (1970).[1]

In the meanwhile, on June 4, 1974 the instant action was commenced in the district court seeking the relief stated above. In an opinion filed January 21, 1975, the court dismissed the complaint. After a notice of appeal was filed on

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1 Burrafato does not challenge the correctness of the finding that he was deportable under Section 241(a)(1) of the Act.

The privilege of voluntary departure permits an alien to avoid the stigma of deportation and may facilitate the possibility of his reentry into the United States. *Strantzalis* v. *Immigration & Naturalization Service*, 465 F.2d 1016 (3 Cir. 1972).

January 24, the court, on application of appellants, on January 28 stayed deportation of Vincenzo and further stayed withdrawal of the privilege of voluntary departure pending this appeal.

II.

Whether the district court was correct in dismissing the complaint for lack of subject matter jurisdiction turns of course on the validity of the claims alleged.

With respect to the claim that denial of Vincenzo's visa application violated the constitutional rights of Antonina, it is sufficient to note that this claim is foreclosed by our recent decision in *Noel* v. *Chapman*, 508 F.2d 1023, 1027-28 (2 Cir. 1975), where we reaffirmed the rule that no constitutional right of a citizen spouse is violated by deportation of his or her alien spouse. See also *Silverman* v. *Rogers*, 437 F.2d 102 (1 Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Swartz* v. *Rogers*, 254 F.2d 338 (D.C. Cir.), *cert. denied*, 357 U.S. 928 (1958).

III.

A closer question is presented by appellants' claim that the failure of the Department of State, in accordance with its regulations, to specify the reasons for denial of Vincenzo's visa application denied him procedural due process.[2]

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2 This is one of those cases where, in order better to focus on what this claim is about, it may be helpful to emphasize what is *not* claimed.

Appellants do not claim denial of due process in the deportation proceedings which would give the federal courts jurisdiction to insure that administrative tribunals conform to the traditional standards of fairness encompassed by due process in determining whether aliens who have entered the United States are deportable. *Bolanos* v. *Kiley*, 509 F.2d 1023, 1025-26 (2 Cir. 1975); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953).

Nor do appellants seek review of the denial of the visa application by the United States Consul in Palermo on grounds of lack of due

Appellants argue in essence that, in failing to specify under which of the thirty-one subsections of Section 212(a) of the Act Vincenzo was excluded, the Department of State did not comply with its own regulation, 22 C.F.R. §42.130 (1975), which requires it to inform an unsuccessful applicant for a visa of the reasons for denial of the visa and to allow the applicant an opportunity to refute the evidence of ineligibility that may have been used against him.[3]

This argument, as appellants' counsel acknowledges, must be considered in the light of repeated admonitions by the Supreme Court that the judicial branch should not intervene in the executive's carrying out the policy of Congress with respect to exclusion of aliens. As recently as its decision in *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972), the Court quoted with approval its earlier opinion in *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547 (1895):

> "The power of congress to exclude aliens altogther from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications."

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process. Indeed, counsel for Vincenzo specifically denied that any review of the consular determination was sought in the instant litigation. As we held long ago, "Whether the consul has acted reasonably or unreasonably, is not for us to determine. Unjustifiable refusal to visé a passport may be ground for diplomatic complaint by the nation whose subject has been discriminated against. . . . It is beyond the jurisdiction of this court." *United States ex rel. London* v. *Phelps*, 22 F.2d 288, 290 (2 Cir. 1927), *cert. denied*, 276 U.S. 630 (1928).

3 The government's affidavit in support of its motion to dismiss the complaint in the district court stated that the reason for denial of a visa to Vincenzo was his "association with organized criminal society" in Italy. Section 212(a)(27) of the Act was cited as the applicable section under which he was excludable.

Despite this strong reaffirmation of judicial policy by the Supreme Court, appellants nevertheless urge that *Mandel* supports their claim that the district court has subject matter jurisdiction. We disagree. In *Mandel*, the Supreme Court was confronted with a challenge to the Attorney General's refusal to waive exclusion of an alien on the ground that First Amendment rights of those who wished to hear the alien would be infringed. The Court held only that, when waiver is not granted for a "facially legitimate and bona fide reason", the courts will not "test it by balancing its justification against the First Amendment interests of those who seek personal communication with the applicant." 408 U.S. at 770.

Likewise, the courts of this Circuit have interpreted *Mandel* to require justification for an alien's exclusion. In *MacDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y., October 10, 1972) (*MacDonald I*), a three-judge court ordered the Secretary of State to set forth his reasons for refusing to waive the ineligibility of an alien. Then in *MacDonald* v. *Kleindienst*, 72 Civ. 1228 (S.D.N.Y., May 6, 1974) (*MacDonald II*), Judge Tenney accepted the reasons tendered as "facially legitimate and bona fide." *Id.* at 14, quoting from *Mandel, supra*, 408 U.S. at 770.

In each of these cases—*Mandel, MacDonald I and MacDonald II*—the claim was grounded on an alleged violation of First Amendment rights of American citizens over which the federal courts clearly had jurisdiction. The significant distinguishing feature of the instant case is that no constitutional rights of American citizens over which a federal court would have jurisdiction are "implicated" here.

If Vincenzo were "legally" within the United States, he might well have standing in the federal courts to require the Department of State to follow its own regulations. But he is not here legally. To give him rights due to his unlaw-

ful presence greater than those he would have had if he had not come to this country, would be the worst sort of bootstrapping and would encourage aliens to enter this country surreptitiously. See *Licea-Gomez* v. *Pilliod,* 193 F.Supp. 577, 582 (N.D. Ill. 1960).[4]

We hold, in short, that the district court correctly decided that it did not have subject matter jurisdiction to review what happened to Vincenzo in Italy or what he claims the Department of State did to him here.

Affirmed.

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4 We have carefully considered appellants' other claims and we find they do not provide any jurisdictional basis for their action.

DEPARTMENT OF STATE

Washington, D.C. 20520

RECEIVED

OCT 21 1971

PAVIA & HARCOURT

Mr. Donald J. Sisk
Pavia & Harcourt
Attorneys and Counselors at Law
63 Wall Street
New York, New York 10005

Dear Mr. Sisk:

I refer to our letter of September 22, 1971 concerning the immigrant visa case of Mr. Vincenzo Burrafato.

The Consulate General at Palermo reported that Mr. Burrafato's case has been carefully reviewed by that office. However, no facts were disclosed which would warrant a reversal of the original finding of ineligibility under Section 212(a) of the Immigration and Nationality Act.

While it is our sincere desire to cooperate in every way possible to clarify the matter, the grounds for the refusal are of a confidential nature and we are prohibited from divulging either the specific subsection of law under which the visa was refused or the facts which constituted the basis for the refusal. However, the Department has had access to the essential facts and is of the opinion that the denial was fully warranted under the terms of the law.

Sincerely yours,

George A. Berkley, Chief
Public Services Division
Visa Office

Relevant Statute

Immigration & Nationality Act, 66 Stat. 163 (1952), as amended:

Section 212, 8 U.S.C., Section 1182 -

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * * *

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States; ...

Relevant Regulation

Title 22, Code of Federal Regulations (C.F.R.) -

Section 42.130 Procedure in refusing visas. -

(a) Refusal Procedure ... When an immigrant visa is refused, an appropriate record shall be made in duplicate on a form prescribed by the Department which shall be signed and dated by the consular officer. The applicant shall be informed of the provision of law, or regulation issued thereunder, on which the refusal is based, and of any statutory provisions under which administrative relief is available. If the grounds of ineligibility may be overcome by the presentation of additional evidence and if the applicant indicates that he intends to submit such evidence, the original of Form FS-510 and the documents attached thereto may in the discretion of the consular officer

and with the consent of the applicant be retained in the consular files for a period not exceeding 120 days after which time the original Form FS-510 and supporting documents shall be forwarded to the applicant if the refusal has not in the meantime been overcome ...

* * * * *

(c) Review of refusals by the Department. The Department may request a consular officer in an individual case or in specified classes of cases to submit a report if an immigrant visa has been refused. The Department will review such reports and may furnish an advisory opinion to the consular officer for his assistance in giving further consideration to such cases. If upon the receipt of the Department's advisory opinion the consular officer contemplates taking action contrary to the advisory opinion, the case shall be resubmitted to the Department with an explanation of the proposed action. Rulings of the Department concerning an interpretation of law, as distinguished from an application of the law to the facts, shall be binding upon consular officers. (Emphasis added).

(d) Reconsideration of refusal. If a visa is refused, and applicant within 120 days from the date of refusal adduces further evidence tending to overcome the ground of ineligibility on which the refusal was based, his case shall be reconsidered without the requirement of the payment of an additional application fee.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

JOSEPH P. MARRO being duly sworn, deposes and says,
that deponent is not a party to the action, is over eighteen years of age, and is employed by the law offices of Fried, Fragomen & Del Rey, P.C. at 515 Madison Avenue, New York, New York. That on the 26th day of August 1975 deponent serve the within Petition for Rehearing etc. upon the attorney(s) for Appellants in this action, at the following address:

United States Attorney, E.D.N.Y.
Federal Building
225 Cadman Plaza, Brooklyn, N.Y.

which address was designated by said attorney(s) for that purpose, by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Joseph P. Marro

Sworn to before me this
26th day of August, 1975.
Alberta M. Poland

ALBERTA M. POLAND
NOTARY PUBLIC, STATE OF NEW YORK
NO. 60-4601241
QUALIFIED IN WESTCHESTER COUNTY
COMMISSION EXPIRES MARCH 30, 1976